United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To Be Argued By
GARY P. NAFTALIS

76-1143

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1143

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

CHARLES D. ERB and
FRANKLIN S. DeBOER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT FRANKLIN S. DeBOER

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA,

Appellee,

- against -

Docket No. 76-1143

CHARLES D. ERB and
FRANKLIN S. DeBOER,

Defendants-
Appellants.

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On Appeal from the United States District Court for the Southern District of New York

BRIEF ON BEHALF OF FRANKLIN S. DeBOER

Statement of Issues Presented for Review

1. Whether a conviction for aiding and abetting the making of a false statement in a registration statement may stand where there was no evidence connecting appellant DeBoer, a 1% partner of the underwriter, with the specific document.

2. Whether the statute of limitations bars appellant DeBoer's conviction where all of his acts of aiding and abetting were outside the limitations period.

3. Whether appellant DeBoer was deprived of a fair trial as a result of the following errors in the trial court's charge:

a. The failure of the trial court to inform the jury that mere knowledge that an offense is being committed is not sufficient for aiding and abetting;

b. The trial court's instruction that the jury should draw no inference against the government for its failure to call a witness, who would have contradicted the Government's principal witness;

c. The trial court's instruction that the jury should presume that a person intends the "natural and probable consequences of his acts."

Preliminary Statement

Franklin S. DeBoer appeals from a judgment of conviction entered on March 11, 1976, in the United States District Court for the Southern District of New York, after a ten day trial before the Honorable Charles L. Brieant, United States District Judge, and a jury.

Indictment No. 74 Cr. 818, a sixteen-count indictment, filed on August 19, 1974, named appellant DeBoer and Charles D. Erb as defendants. Count One charged appellant DeBoer and Erb with conspiring to falsely state, in registration statements filed with the Securities and Exchange Commission ("SEC"), letters and prospectuses, that their alleged nominees, and not the defendants themselves, were the owners of certain shares of Xprint Corporation, a company which then was contemplating a public offering of its stock, in violation of Title 18 U.S.C.

§371. Counts Two through Five charged both defendants with making such false statements in Xprint registration statements and amendments thereto, filed in August through December, 1969, in violation of Title 15 U.S.C. §77x. Counts Six through Eight charged DeBoer alone with making false statements on the same subject in documents submitted to the SEC in October and December, 1969, in violation of Title 18 U.S.C. §1001. Counts Nine through Twelve charged both defendants with causing letters to be mailed on the same subject, pursuant to an alleged scheme to defraud, in violation of Title 18 U.S.C. §1341. Counts Thirteen through Sixteen charged both defendants with causing the transmission of prospectuses containing false statements on the same subject in December, 1969, in violation of Title 15 U.S.C. §§ 77(e)(b) and 77(j).

Trial commenced on April 21, 1975, before Judge Brieant and a jury. At the end of the Government's direct case, the Court dismissed the conspiracy count for failure to prove the conspiracy alleged in the indictment (Tr. 783-86), and dismissed Counts Nine and Eleven, two of the mail fraud counts, because of lack of proof of use of the mails (Tr. 768-69).*

On May 2, 1975, the jury returned a verdict of guilty against DeBoer only on Count Two and found DeBoer not guilty on the remaining twelve counts (Counts Three through Eight, Ten,

*References preceded by "A" are to the joint appendix. References preceded by "TR." are to the trial transcript. References preceded by "GX" are to Government exhibits and by "DX" are to appellants' exhibits.

and Twelve through Sixteen). The jury found the defendant Erb guilty on each of Counts Two through Five, Ten, and Twelve through Sixteen.

On March 11, 1976, Judge Brieant sentenced appellant DeBoer to three years imprisonment, five months of said sentence to be served in a jail-type institution, with execution of the remainder of the prison sentence suspended, a fine of $5,000 and placed DeBoer on probation for a period of thirty-one months to commence on his release from prison. At the same time, Erb was sentenced to concurrent terms of eighteen months imprisonment on each of the counts on which he was convicted, except Count Ten, on which execution of sentence was suspended, and placed Erb on probation for a period of thirty-one months to follow his release.

Appellant is presently enlarged on bail pending appeal.

STATEMENT OF FACTS

Synopsis

Appellant Franklin S. DeBoer, a 1% partner in the New York stock brokerage firm of Baerwald & DeBoer, was convicted of one count of aiding and abetting the making of a false statement in a registration statement filed by Xprint Corporation with the SEC on August 20, 1969. Appellant was acquitted by the Court and jury of the other 15 counts in the indictment. The alleged false statement was that one James Lovelett was the owner of 5,000 shares of the common stock of Xprint Corporation,

of which 2,500 shares were being registered for sale as part of a proposed public offering of 112,375 shares of Xprint stock. In fact, the Government alleged that DeBoer and not Lovelett was the owner of the 5,000 shares of Xprint stock. Xprint was an entirely legitimate company whose stock was being underwritten by the firm of which appellant was then a 1% partner. Approximately one month after the filing of the registration statement - on September 30, 1969 - appellant resigned from the firm and sold his remaining 1% interest. Hence, appellant was not even a partner of Baerwald & DeBoer when the registration statement became effective some three months later. As it turned out, the Xprint public offering was cancelled and none of the Xprint stock, including appellant's 2,500 shares, were ever sold to the public. No evidence was adduced at trial that any investor had relied on the misrepresentation as to DeBoer's ownership, even if the shares had been sold. No one made or lost any money because of the misrepresentation of which DeBoer was convicted. There was no evidence that DeBoer was planning to manipulate or in any way misuse Xprint stock had the offering been consummated.

The Government's Case

The Government's case against DeBoer rested primarily on the testimony of George Van Aken, a confessed stock swindler and former partner in Baerwald & DeBoer. Van Aken was a stock swindler of epic proportions and the prosecutor told the jury in his opening statement that Van Aken had committed "a hundred

or more" crimes (Tr. 31). On cross-examination, Van Aken admitted that he had engaged in a series of stock swindles between 1970 and 1972 in which he had "lied to," "cheated" and "defrauded" customers, brokers and mutual funds out of many hundreds of thousands of dollars while receiving hundreds of thousands in illegal profits and commercial bribes in excess of $100,000 for himself (Tr. 216-17; 250-51). Van Aken conceded that he "had no hesitancy about lying" and that he had lied "just about every working day" from 1969 and through 1972 (Tr. 264). Van Aken also admitted that he had destroyed records in 1972 when he was under investigation by the SEC (Tr. 252-53).

In March, 1973 after a lengthy investigation, the Government proposed to Van Aken that if he pleaded guilty to two counts of securities fraud in separate cases, and testified as its witness, he would not be prosecuted for any other frauds he had committed or for tax evasion, no member of his family would be prosecuted, and he would have a "veto power" over what judge would sentence him. Van Aken made the deal (Tr. 218-24). At the time of his testimony in the instant case, Van Aken had not yet been sentenced on his plea of guilty.*

Appellant DeBoer had been one of the founding partners of the New York City brokerage firm of Baerwald & DeBoer and had held the position of managing partner of the firm. In the spring of 1969, appellant began the process of severing his connection with the firm and turning it over to a new owner-

*Van Aken was later sentenced to three years in prison.

ship group made up of Van Aken and Erb. In late April, 1969, Van Aken and Erb discussed changing the name of the firm and dropping DeBoer's name (Tr. 241). After negotiations and discussions, DeBoer sold his entire interest in the partnership except for 1% to Van Aken and Erb in June, 1969. With the sale of almost all of his equity, DeBoer at the same time "substantially curtailed" his activities at the firm and was in the office on an "irregular basis" from June, 1969 on (Tr. 636-39; 237-39). DeBoer technically remained as managing partner until Erb sucessfully passed the managing partner's test. On September 30, 1969, appellant formally resigned from Baerwald & DeBoer and sold his remaining 1% interest in the firm (Tr. 617-18).

The Xprint underwriting had its genesis during this time period. In April, 1969, Van Aken and Erb met with Earl Diemund, the president of Xprint Corporation, a firm engaged in the manufacture of color reproduction equipment.* Also present were Paul DeCoster, Xprint's attorney, and Conrad Schmitt, a former associate of Van Aken (Tr. 60-64). DeBoer was not present at this meeting; nor was he ever present at meetings with Xprint's management or Xprint's attorneys (Tr. 445-46; 571-72). At this meeting, Van Aken and Erb agreed to assist Xprint in a private placement of its stock and Diemund agreed to make Xprint stock available to Van Aken and Erb at "nominal sums" in return for their efforts. Van Aken

*Unlike the typical securities fraud or "manipulation" case, there was no suggestion in this case that Xprint was anything other than a legitimate compar whose financial condition was exactly as represented in its prospectus.

also expressed his willingness to do a public offering of Xprint at some later time (Tr. 60-64). Subsequently, Erb and Van Aken signed an agreement for a private placement of Xprint's stock through Baerwald & DeBoer (GX 101B; 64-65; 407-08). As a result, Van Aken was to receive 63,750 shares of Xprint stock for $12,000 or 18.8 cents a share and Erb was to receive 50,000 shares of Xprint stock for $2,500 or 5 cents a share.

Van Aken testified that on April 22, 1969, he and Erb spoke with appellant at the offices of Baerwald & DeBoer. Van Aken described Xprint's business and asked DeBoer to make an investment in the company by buying 5,000 shares at $2.00 per share. Van Aken did not disclose to DeBoer that he and Erb were only paying 18.8 cents and 5 cents a share, respectively, for the Xprint stock that they were purchasing. Van Aken told DeBoer that at some unstated time in the future there would be a public offering of Xprint stock at $7.00 or $8.00 a share and DeBoer would be able to sell 2,500 shares on the offering (Tr. 72-74). DeBoer gave Van Aken his check for $10,000 as payment for the Xprint stock. According to Van Aken, DeBoer requested that his Xprint shares be issued in the name of James Lovelett, DeBoer's nominee. DeBoer cited tax considerations and possible problems with NASD and SEC rules regarding excess underwriting compensation in the event of a public offering as the reasons for taking the stock in nominee name (Tr. 72-75; GX 103).*

*The April 22, 1969 meeting was the core of the Government's case against DeBoer.

In early May, 1969, DeBoer sent Van Aken a note which said: "Van Aken, where is my stock that I paid $10,000 for." (GX 104.) After receiving the note, Van Aken went to DeBoer's office and told him that the stock had not yet been issued. DeBoer asked Van Aken to take care of obtaining the stock for him (Tr. 91-92). There was no evidence that DeBoer ever received the stock certificate for the 5,000 shares of Xprint stock.

Van Aken further testified that in the "second week" of June, 1969, he received an investment letter from Xprint for James Lovelett to sign. He brought the letter to DeBoer, who returned it signed shortly thereafter (Tr. 92-93 ; GX 114). Van Aken's testimony as to this conversation, however, was particularly suspect because DeBoer's passport showed that he was out of the United States at the time Van Aken claimed this conversation occurred (DX JJ).

James Lovelett testified that for a number of years he had lived with appellant and his wife, who treated Lovelett as if he were one of their children (Tr. 327; 351; 354). In December, 1968, Lovelett gave DeBoer a power of attorney which empowered DeBoer to sign Lovelett's name on checks and certain other types of documents (Tr. 335-36; 355; GX 201). Lovelett testified that he was aware that DeBoer had effected securities transactions in his name. However, Lovelett never discussed Xprint with DeBoer and was unaware that Xprint shares had been issued in his name or that he was listed as a selling shareholder on the proposed Xprint public offering (Tr. 343-45). On cross-

examination, Lovelett conceded that, at his request, DeBoer had lent him money for the purpose of investing in the stock market. DeBoer had complied with this request, by placing money in Lovelett's account and buying and selling securities. Lovelett testified that he was not concerned with what stocks DeBoer bought and sold in his account so long as Lovelett made a profit (Tr. 356-58; 368-69).*

Van Aken also testified that shortly after the April 22, 1969, meeting with DeBoer, he and Erb had a conversation. At that time, Van Aken told Erb that he would be "using" one Donald Sedgewick as a nominee for the Xprint stock that he was to receive and Erb replied that he would "probably use Dr. Scott Skillern" as his nominee. Van Aken also told Erb that he would let Sedgewick keep one-third of the stock put in his name and Erb said he would probably do likewise (Tr. 88-89). DeBoer was not present at this meeting and there was no evidence that DeBoer was ever informed that Van Aken and Erb were taking their Xprint shares in the names of Sedgewick and Skillern.

On May 12, 1969, Van Aken and Erb met with Earl Diemund, Paul DeCoster and Conrad Schmitt. At that meeting it was finally agreed that Baerwald & DeBoer rather than an outside firm would do the public offering for Xprint (Tr. 545-47). DeCoster told Van Aken and Erb that since Baerwald & DeBoer would be the underwriter on the public offering, they would

*The Government introduced evidence that the transactions and profits in Lovelett's account were of substantial magnitude as circumstantial evidence from which the jury could infer that these transactions were for DeBoer's benefit and that Lovelett was simply a nominee.

be unable to have Xprint stock in their names because it would violate the SEC and NASD rules regarding underwriter's compensation. It was agreed that Van Aken and Erb would be permitted to designate other people to buy and own their Xprint stock.The "designees" were Donald Sedgewick for Van Aken and Scott Skillern for Erb (Tr. 545-49; 412-14; 89-90). There was no evidence that DeBoer was ever informed about this meeting or the discussions held at it.

The 50,000 Xprint shares originally intended for Erb were issued in the name of Dr. Scott Skillern. Erb and Skillern, however, agreed that Skillern would hold these securities in name only and that Erb would actually retain ownership of most of them. Initially, Erb sold Skillern 11,000 of the shares for $1,700 and retained ownership of the remaining 39,000. In October, 1969, Erb sold Skillern an additional 9,000 Xprint shares for $2,000 and as a result, Erb retained ownership of 30,000 of the Xprint shares issued in Skillern's name (Tr. 470-71; 478-79).

The charges in the indictment related to false statements made in registration statements, prospectuses and other documents submitted in connection with the proposed Xprint public offering. With respect to DeBoer, the alleged falsity related to the listing of Lovelett (and not DeBoer) as the owner of 5,000 shares of Xprint, of which 2,500 shares were being offered to the public. With respect to Erb, the alleged falsity related to the listing of Skillern as the owner of 50,000 shares of

Xprint, when in truth, 30,000 of these shares were owned by Erb.

The registration statement was filed on August 20, 1969, by Paul DeCoster, the lawyer for Xprint, the issuer. DeCoster testified that he never met DeBoer and had had no discussions or communications with DeBoer regarding the information contained in the registration statement or in any of the amendments to the registration statement subsequently filed in October and December, 1969 (Tr. 571-72). Robert E. Fischer, Esq., the lawyer for Baerwald & DeBoer on the underwriting, also testified that he had no conversations with DeBoer on the matter (Tr. 594-95). There was no evidence that DeBoer ever reviewed or even saw the registration statement and amendments filed with the SEC and the letters submitted to the NASD that were the basis of the mail fraud counts or was even aware that they were filed at the time they were filed.*

The Xprint registration statement became effective on December 22, 1969 -- some three months after DeBoer had resigned from the firm (Tr. 146). In January, 1970, Erb

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*Van Aken testified that on three occasions in October and December, 1969, he received letters from Xprint to be signed by Lovelett and submitted to the SEC in connection with the proposed public offering. On each of these occasions, he telephoned DeBoer, who indicated that his former secretary Ruth Haraldsen would sign them. Van Aken claimed that Haraldsen signed the three letters in his presence (Tr. 134-42). Ruth Haraldsen, called as a Government witness, testified that she didn't remember signing Lovelett's name on the three letters, thereby contradicting Van Aken's account (Tr. 506-07). An FBI handwriting expert was unable to conclude that Haraldsen signed Lovelett's name on the three letters (Tr. 800-01). The jury apparently disbelieved Van Aken's testimony because it acquitted DeBoer on Counts Six, Seven and Eight which related to these three letters.

cancelled the public offering (Tr. 148). Earl Diemund, Xprint's president, explained what happened as follows:

> "I was told by people at Baerwald and DeBoer -- I believe it was George Van Aken, but it could well have been by Mr. Erb -- toward the end of December that the underwriting was sold out and then it became unsold and then it decreased in size from sold underwriting that included stock for the selling shareholders down to just the stock that was being offered by the company. The agreement was for 100,000 shares of stock for the company for some 22,500 shares of stock for the selling shareholders, with an option for another, I believe it was 12,000 shares of stock for the company. They had a right for an extra 10 per cent or 12 per cent overage.
>
> And conversations held during that month started out that all 136,000 shares of stock. . .
>
> * * *
>
> That all the shares of stock were sold in December and then they sort of became unsold and of course after around the first few days in January George Van Aken disappeared from the -- from my contacts with Baerwald and DeBoer and subsequent to that they would have been with Mr. Erb and I believe about the last conversation we had was around the 15th of January, at which time I was notified that the selling shareholder's stock was not sold, but that 100,000 shares of stock had been sold and the stockholders' names would be given to the bank the next day, which would have been the 16th of January. . .
>
> * * *
>
> And we were to pick up the checks for $750,000 but when we arrived in the morning I was handed a telegram from the SEC -- I believe it was from the SEC -- that directed Baerwald and DeBoer to return the monies received for Xprint Corporation back to the public. And I got no other explanation than that telegram at that time. . .
>
> * * *
>
> I believe [appellant Erb]. . .said that George Van

> Aken had left the firm and in the process of doing so that certain firm monies were due a third party who I never heard the name of and that it was necessary over the weekend of the 17th and 18th of January to pay off an amount of money like $300,000. And that the only place he could put his hands on the money was by putting a stop order in on a check that Baerwald and DeBoer had put into the bank on the 16th.
>
> And when that money was removed from our trust account, the only other option that they had, he had, whoever he is, Baerwald & DeBoer or Erb was to notify the SEC that they had not completed the underwriting. . ."(Tr. 424-29).

Thus, the entire public offering was cancelled and the funds paid in by all prospective purchasers were returned.

THE DEFENSE CASE

Neither DeBoer nor Erb testified in his own behalf at trial.

DeBoer introduced in evidence a stipulation as to the testimony of handwriting experts employed by the FBI and the United States Postal Service. According to the stipulation, the FBI handwriting expert was unable to determine that Ruth Haraldsen had signed James Lovelett's name on three letters sent to the SEC (GX 109) which were the subject of Counts 6, 7 and 8 of the indictment (Tr. 800-01). This testimony contradicted Van Aken's assertion that Mrs. Haraldsen had signed Lovelett's name on these documents at DeBoer's direction. The jury subsequently acquitted DeBoer of those charges.

According to the stipulation, the Post Office hand-

writing expert concluded that DeBoer had not signed Lovelett's name on GX 114 -- Lovelett's investment letter dated June 10, 1969 (Tr. 801-2). DeBoer also offered in evidence his passport that established that he was out of the country during the first two weeks of June, 1969 when Van Aken claimed that he had brought Lovelett's investment letter (GX 114) to DeBoer for signature (DX JJ).

The Sentence

Appellant DeBoer had no prior criminal record. He had retired from the securities business in 1969 and moved to Florida. The single count on which he was convicted related to events that occurred approximately seven years ago.

Indicating that it was relying only on the trial record before it, and that it saw no need for appellant to be rehabilitated, the Court stated that it had "a duty to deal with these matters without regard to any feeling that the Court must have for people whose lives are otherwise blameless." The Court concluded that "DeBoer's culpability is less" and that he "was not in on all the activities which began the day that Marint came into the house of Baerwald and DeBoer." The Court then sentenced Appellant to five months in jail and a $5,000 fine. (Sentencing minutes, pp. 1-22.)

POINT I

THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTION OF DeBOER

Appellant DeBoer was acquitted by the jury of twelve of the thirteen counts submitted to it.* Count Two of the indictment -- the single count of which DeBoer was convicted -- alleged that a material false statement was made in Xprint's registration statement filed with the SEC on August 20, 1969.** The Government's proof as to DeBoer on this charge was plainly insufficient. There was no evidence that DeBoer prepared the document, reviewed its contents before it was filed, supplied any information to the attorneys who prepared it, or even knew that a false registration statement was filed on August 20, 1969. DeBoer, a 1% partner of the underwriter, had no responsibility for the contents of the document. Quite simply, there was no evidence connecting DeBoer to this specific document.***

*The Court had acquitted DeBoer on three other counts at the close of the Government's case. (Tr. 768-69; 783-86).

**DeBoer was acquitted on Counts 3, 4, 5 which alleged that DeBoer aided and abetted the making of the exact same false statement in the amendments to the Xprint registration statement filed in October and December, 1969.

***This fact was recognized by the District Judge towards the conclusion of the Government's case when he informed the prosecutor:

> "...you haven't yet connected the defendant DeBoer with the false [registration] statement and there is at least a suggestion that he was out of the firm when the statement was filed." (Tr. 502-10).

No such connection was ever made.

Under these circumstances, this conviction cannot stand.

Concededly, DeBoer had nothing to do with the preparation or filing of the registration statement. The Government did not even claim that DeBoer acted as a principal, but attempted to fasten criminal responsibility on DeBoer as an aider and abettor (Tr. 823-24; 888-89). The Government's evidence relating to DeBoer on this charge was as follows:

1. A conversation on April 22, 1969, between Van Aken Erb and DeBoer in which DeBoer stated that he was putting his Xprint stock in nominee name (James Lovelett) because of tax considerations and possible problems of excess underwriting compensation under SEC and NASD rules in the event of a public offering (Tr. 72-75);

2. A conversation between DeBoer and Van Aken in the beginning of May, 1969 in which DeBoer asked what happened to his Xprint stock and Van Aken said he would take care of obtaining DeBoer's stock for him (Tr. 91-92; GX 104);

3. A conversation in the "second week" of June, 1969 in which Van Aken gave DeBoer an investment letter to have signed by Lovelett. According to Van Aken, shortly thereafter, DeBoer returned the letter to him signed (Tr. 92-93; GX 114)*; and

*It is doubtful that this third conversation may even be considered in determining sufficiency because it was so discredited by other evidence in the case. See United States v. Taylor, 464 F.2d 240 (2d Cir. 1972). The evidence

(cont'd on next page)

4. Lovelett's testimony that DeBoer had effected securities transactions in his name and that he was unaware that Xprint shares had been issued in his name (Tr. 343-45). From this testimony and evidence regarding DeBoer's control over Lovelett's bank account the jury could infer that Lovelett was a nominee and not the beneficial owner of the Xprint stock.

Taking the Government's proof at its best there was simply no evidence which connects DeBoer to the specific false document -- the August 20, 1969, registration statement. It is undisputed that DeBoer never reviewed the contents of the registration statement prior to its filing (or indeed at any time). He never supplied any information to DeCoster, Xprint's attorney, or to Fischer, Baerwald & DeBoer's attorney, or to Xprint's officials for inclusion in the registration statement. Indeed, it is undisputed that DeBoer had no dealings whatsoever with the attorneys or company officials on this matter (Tr. 445-46; 571-72, 594-95). DeBoer, a 1% partner of the firm, had no responsibility for the underwriting and the documents

*(footnote cont'd from page 17) at trial showed that DeBoer was outside the country at the time Van Aken claimed this conversation occurred (DX JJ). Moreover, the Government's own handwriting expert conclusively determined that DeBoer did not sign Lovelett's name on this letter (Tr. 801-02). In addition, the acquittal of DeBoer on Counts 6, 7 and 8, which charged him with causing allegedly false letters purportedly but not actually signed by Lovelett to be submitted to the SEC, further undermines this proof. Indeed, Judge Brieant gave no weight to this conversation in his opinion below ruling on the sufficiency of the evidence.

required to be filed in connection with it. That was the responsibility of Van Aken and Erb. Nor did DeBoer ever have any conversation with Van Aken in which he was informed that this registration statement was being filed on August 20, 1969, and that false information was being supplied for inclusion therein.

No such connection is furnished by the April 22, 1969, meeting -- which was the lynchpin of the Government's case against DeBoer. In that meeting there was no discussion whatsoever about registration statements let alone the specific registration statement which is the subject matter of Count Two of the indictment. That conversation does not suffice to meet the Government's burden of connecting DeBoer to the specific false registration statement in issue. See United States v. Dickerson, 508 F.2d 1216, 1217-18 (2d Cir. 1975); United States v. Peoni, 100 F.2d 401, 402-03 (2d Cir. 1938) (L. Hand, J.). Nor may Van Aken's knowledge of the filing of the registration statement on August 20, 1969 be imputed to DeBoer. It is well-settled that "the requisite knowledge cannot be imputed from one aider and abettor...to another." United States v. Tavoularis, 515 F.2d 1070, 1074 (2d Cir. 1975).

Apposite to the instant case is United States v. Koenig, 388 F.Supp. 670 (S.D.N.Y. 1974). In Koenig, the defendants, including the company's president and certain of its directors, were charged, inter alia, with filing materially misleading forms 10-Q, 10-K and 8K with the SEC. The Court concluded that

one can be criminally responsible for a false filing only if he was involved in its preparation or filing or had a duty to insure the accuracy of the contents. One of the defendants, Byron Krantz, was acquitted by the Court of all counts dealing with those filings because there was "no evidence of any substance connecting Krantz with any filings." Id. at 720. The Court acquitted Krantz of those counts because Krantz was not shown to be connected with the specific filings, in that he had neither prepared nor reviewed the documents before their submission to the SEC, even though he was a member of the Board of Directors when some of the filings were made. Another director, George Mulligan, was acquitted of all the filing counts, save one, on the same ground, i.e., that there was no evidence that he had anything to do with preparing or reviewing the specific document. As to the remaining count, Mulligan was held responsible for the contents only because he actually reviewed the contents of the specific document before it was filed.*

In the instant case, DeBoer did not participate in the drafting or the filing of the registration statement. There was no evidence that he reviewed the contents of the document or supplied information to the lawyers for inclusion in this specific filing. Hence there was an absence of any

*Mulligan was also acquitted of that charge because the Court held the document was not false. (388 F. Supp. at 720.)

connection between DeBoer and the specific false document.*

In sum, the Government's evidence as to DeBoer was legally insufficient and his conviction cannot stand.

*In denying DeBoer's motion for a judgment of acquittal, the District Judge stated that "[i]t was a natural or foreseeable consequence" of DeBoer's decision to have his Xprint stock issued in nominee name that "the attorneys would be caused to make material false statements in the registration statements." Judge Brieant thus concluded that by using Lovelett as a nominee DeBoer "knew or should have known" that a false statement would be included in the registration statement. (Opinion of September 5, 1975, pp. 13-14.) We respectfully submit that the District Judge's analysis is plainly wrong. To be found guilty as an aider and abettor, the defendant must consciously assist the commission of a specific crime in some specific way. United States v. Dickerson, supra, 508 F.2d at 1217-18. Substantive liability may not be premised on what a defendant "should have known" or on the foreseeable consequences of his conduct. Indeed, this Court has specifically admonished District Judges not to instruct juries that a person is presumed to intend the natural and probable consequences of his acts, United States v. Bertolotti, 529 F.2d 149, 159 (2d Cir. 1975); United States v. Barash, 365 F.2d 395 (2d Cir. 1966), an admonition that Judge Brieant ignored in his charge (Tr. 1059). (See discussion, Point III, infra.)

POINT II

DeBOER'S CONVICTION ON COUNT TWO IS BARRED BY THE STATUTE OF LIMITATIONS

It is elementary that no one may be held criminally responsible for conduct that occurred beyond the period fixed by the statute of limitations. The instant indictment was filed on August 19, 1974 and the applicable statute of limitation is five years (18 U.S.C. §3282). While the filing of the Xprint registration statement by the lawyer DeCoster on August 20, 1969 barely comes within the limitation period by one day, it is undisputed that DeBoer's acts of aiding and abetting do not.* The latest act performed by DeBoer which in any way relates to Count Two occurred in early June, 1969 -- more than five years before the filing of the indictment -- and there is not a scintilla of evidence that DeBoer committed any acts of aiding and abetting on August 19 or 20, 1969, which would bring him within the limitations period. Since DeBoer's acts of aiding and abetting occurred beyond the period of limitations, his conviction must therefore be reversed.

Requiring that an aider and abettor may only be prosecuted if his acts of aiding and abetting are within the limitations period is consistent with the policies that underlie the statute of limitations. That statute reflects a considered social judgment that citizens should not be required to meet

*DeBoer's alleged acts of aiding and abetting this offense are discussed in Point I, supra.

overly stale changes by restricting one's criminal liability for his actions to a fixed and definite period of time. As the Supreme Court has pointed out:

> "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

Toussie v. United States, 397 U.S. 112, 114-15 (1970).

Hence, statutes of limitation are to be liberally construed in favor of the accused. United States v. Marion, 404 U.S. 307, 322 n.14(1971); United States v. Habig, 390 U.S. 222, 227 (1968).

The Government claimed below (and will undoubtedly urge here) that the limitations period for an aider and abettor only commences when the principal commits a crime. According to the Government's argument the statute of limitations as to DeBoer on Count Two would not have begun to run until August 20, 1969, when the principal, the lawyer DeCoster, filed the registration statement with the SEC in Washington, D.C. This argument misses the point. The real issue is when DeBoer's alleged crime occurred, not when someone else's crime was

committed.

DeBoer's crime, if such there were, took place when he committed his last act of aiding and abetting -- concededly outside the statute of limitations period. If the rule were otherwise, an almost indefinite statute of limitations would be created for aiders and abettors while the principal would have a fixed five year statute of limitations from the date he acted. The statute of limitations for an aider and abettor such as DeBoer would then totally depend upon the fortuitous circumstance of when the principal physically filed the registration statement. As a result, DeBoer (or any other aider and abettor) could be criminally prosecuted for substantive offenses based upon acts of aiding and abetting that occurred well beyond the limitations period so long as the principal filed a registration statement or committed any other crime within the limitations period. Yet if these same acts by DeBoer also constituted a direct violation of law thereby making him responsible as a principal, he could not be punished for that violation because of the statute of limitations. Such an anomalous result creating an almost indefinite limitations period for aiders and abettors, would run counter to the policy reasons underlying the statute of limitations and the well-settled rule that statutes of limitation are to be interpreted in favor of repose. See, e.g., Toussie v. United States, supra, 397 U.S. at 115; United States v. Marion, supra, 404 U.S. at 322 n. 14. Indeed, neither the District Judge nor counsel

was able to find a single reported case where an aider and abettor, whose acts were outside the statute of limitations period, was held criminally responsible for a substantive offense simply because the principal's acts were within the limitations period.*

Judge Brieant recognized that adopting the Government's interpretation of the statute of limitations "could result in the prosecution of stale charges and in prejudicing the defendant's ability to defend against these charges." (Opinion, Sept. 5, 1975, pp. 21-22.) However, the District Judge did not decide this issue because he held that under 15 U.S.C. §77x, the offense is a continuing one. We respectfully submit that the Court erred in that holding. The Supreme Court in Toussie v. United States, supra, made plain that there is a strong legislative reluctance to treat crimes as continuing offenses:

> "And Congress has declared a policy that the statute of limitations should not be extended '[e]xcept as otherwise expressly provided by law.' 18 U.S.C. §3282. These principles indicate that the doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, '[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated

*The failure to find such authority supporting the Government's attempt to extend the limitations period may well indicate that stale claims such as these are not properly the subject of criminal prosecution.

The rule in conspiracy cases, of course, is different. There, a defendant may be criminally responsible so long as one of his co-conspirators committed an act within the limitations period. In the case at bar, the Court dismissed the conspiracy count. Moreover, DeCoster, the lawyer who filed the registration statement, was conceded not to be a participant in the alleged criminal scheme (Tr. 817, 819); therefore, his act of filing would not even be sufficient to satisfy the statute of limitations on a conspiracy charge.

> term.' 410 F.2d, at 1158. These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." (397 U.S. at 115).

Certainly, no such result is required in the case at bar. 15 U.S.C. §77x creates not a continuing offense, but a single act crime.

Deboer's acts constitute a discrete and identifiable wrong. To treat such acts as a continuing offense would be an unwarranted stretching of the statute of limitations. Cf. United States v. Laut, 17 F.R.D. 31 (S.D.N.Y. 1955).

In sum, the statute of limitations bars prosecution of DeBoer for a substantive crime where his acts of aiding and abetting occurred outside the limitations period. His conviction must be reversed.

POINT III

THE TRIAL COURT ERRED IN THREE MATERIAL RESPECTS IN ITS INSTRUCTIONS TO THE JURY

Judge Brieant erroneously charged the jury on three matters of significance. Each of these erroneous instructions deprived DeBoer of a fair trial and constituted reversible error. In any event, the cumulative effect of the three errors clearly mandates reversal of DeBoer's conviction.

A. The Trial Court Erred In Its Instructions To The Jury On Aiding and Abetting

The Government's theory was that DeBoer was an aider and abettor. As discussed in Point I, supra, the evidence against DeBoer was hardly overwhelming. In a case as close as this, it was essential that the Court instruct the jury with extreme precision on the concept of aiding and abetting. The trial judge did not do so because he failed to charge that mere knowledge that a crime is being committed is not sufficient to make one an aider and abettor. DeBoer's counsel immediately called this omission to the Court's attention:

> "Your Honor, when you charged aiding and abetting, one thing which I felt should have been charged and one thing your Honor said throughout the case was not in there and I think it could be misleading unless it is told to them, that mere knowledge on the part of a defendant that an offense is being committed is not sufficient to make him culpable or words to that effect, that was not included, and I would respectfully ask that it be included. It's very applicable in this case." (Tr. 1096).

Judge Brieant, however, refused to so charge (Tr. 1097).

The Court's failure to so instruct the jury was reversible error. United States v. Terrell, 474 F.2d 872 (2d Cir. 1973); United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962).

In Terrell and Garguilo, an instruction defining aiding and abetting was given to the jury. Yet, in both cases because of the closeness of the issues, this Court reversed the conviction because the trial judge had failed to instruct the jury that mere knowledge that a crime was being committed did not suffice to constitute aiding and abetting. These cases hold that it is necessary that the jury be told in plain words that the defendant must be a participant and not merely a knowing spectator. United States v. Garguilo, supra, 310 F.2d at 254; United States v. Terrell, 474 F.2d at 876.

Like Garguilo and Terrell, the case against DeBoer was a close one. There was no evidence connecting DeBoer to the allegedly false registration statement filed on August 20, 1969. Yet the jury was not instructed that the mere fact that DeBoer may have guilty knowledge would have been insufficient unless he participated in the specific criminal venture. In a close case, as this one was, the trial court's failure was fatal.

*Indeed, Judge Brieant's charge on aiding and abetting was remarkably similar to the instruction found to be inadequate in Terrell. Judge Brieant charged as follows:

> "Now, while there is no precise rule as to what acts constitute aiding and abetting, it is
> (cont'd on next page)

B. The Trial Court Erred In Charging That Donald Sedgwick Was A "Cumulative" Witness, From Whose Absence The Jury Could Therefore Draw No Inference Against The Government; That Error Was Compounded When, Advised That Sedgwick Would In Fact Have Flatly Contradicted Van Aken And Thus Could Not Conceivably Be Regarded As "Cumulative," The Court Refused To Correct Its Instruction

Although Van Aken testified to his plan to use one Donald Sedgwick as his Xprint nominee and Van Aken's shares were in fact transferred to Sedgwick's name (Tr. 90, 413-14), the Government did not call Sedgwick to show that he really was the nominee Van Aken said he was. Indeed, apparently sensitive in this one instance to its Brady obligations, the Government notified the defense that it would not call Sedgwick. When the defense interviewed him, Sedgwick "flatly contradicted Mr. Van Aken and said he was not a nominee but he considered himself to be the owner of the securities" (Tr. 1097).

Although there was no issue as to Sedgwick's availability, it turned out that neither side called him, and in summation appellant DeBoer's counsel strenuously argued

*(footnote cont'd from previous page)

> enough if a defendant in some way associates himself with the criminal venture, that he participates in it, as in something he wishes to bring about, or needs, that he seeks by his action to make the criminal efforts of the person who is being aided and abetted succeed." (Tr. 1043).

The Court in Terrell charged as follows:

> "In order for a defendant to aid or abet another to commit a crime it is necessary that he wilfully associate himself in some way with the criminal venture, that he wilfully participate in it as something that he wishes to bring about, that he wilfully seek by some action of his to make it succeed." (474 F.2d at 876).

that it was the Government which should have done so:

> "Mr. Van Aken also told you that he used a fellow named Donald Sedgwick as a nominee. That's an important fact. The Government as I said has pulled out a lot of stops in this case. They called in all sorts of insignificant witnesses to bolster this frail and skimpy case of theirs. Why didn't they call Sedgwick to corroborate Van Aken's story? Here's a guy who could corroborate him dead center. Surely if Sedgwick would have testified he was Van Aken's nominee in this deal, the Government would have called him as a witness, and they didn't, and you may find that they didn't because he wouldn't." (Tr. 977).

The defense did not request a charge on Sedgwick's absence.* The Government, however, made a request which included the following language:

> "If the Government has failed to call a witness who is equally available to both sides, you may not draw an inference that his or her testimony would have been unfavorable to the prosecution. There is no presumption against the Government from its failure to call witnesses if it should appear to you that their testimony would be merely cumulative or repetitive and of no greater value than that of witnesses who have testified" (A. 31).

Since Sedgwick was the only person to whom this language

*The defense cannot be faulted for not requesting the charge which we contend should have been given once the Court undertook to say anything at all about Sedgwick's absence. Both the defense and the Government knew that Sedgwick denied being a nominee, and burdened with that knowledge, the Government could hardly have urged the jury to infer that Sedgwick would have supported Van Aken if called. Consequently, a charge permitting the jury to draw an inference either way was not, from the defense standpoint, preferable to a strong defense argument in summation followed by no charge at all.

could have been intended to relate, and the Government knew full well that Sedgwick would deny that he was Van Aken's nominee if called, this request was simply disingenuous. In the seventy-page colloquy with counsel about its proposed charge, the Court gave no hint that it would give any instruction on the point (Tr. 807-75). Nevertheless, the Court proceeded to charge on uncalled witnesses substantially as the Government had requested:

> "Now, there is no duty on the part of the government to call in other or additional witnesses whose testimony would merely be cumulative. You are to decide this case on the evidence which is before you or upon the absence of evidence, but not upon evidence which might have been brought before you. Specifically, the government had no duty to call Donald Sedgwick as a witness. As I explained to you earlier, defendants have no duty to call any witnesses or bring any evidence. However, Donald Sedgwick is equally available to both sides, and could be subpoenaed by the government or by any defendant if either of them thought they should do so and, accordingly, no inference follows adverse to anyone from the failure to call him as a witness and no such inference adverse to any side in this litigation follows from a failure to bring in testimony which the jury would regard as merely cumulative" (Tr. 1040).

The law is crystal clear in this Circuit that unless the evidence would be simply cumulative, the jury should be charged that it may draw an adverse inference against either party, for failure to call an equally available witness. United States v. Dixon, (2d Cir. March 12, 1976) slip opinion at 2623-24; United States v. Llamas, 280 F.2d 392 (2d Cir. 1960); United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946).

Compare United States v. Antonelli Fireworks Co., 155 F.2d 631, 638 (2d Cir.), cert. denied, 329 U.S. 742 (1946).

It is obvious that the testimony of Sedgwick would have been anything but cumulative in this case. Had Sedgwick appeared and said he was in fact Van Aken's nominee, Van Aken's story about plotting with appellants Erb and DeBoer to hide their ownership so as to evade the NASD's excess compensation rules would have been incomparably stronger, since there was no other proof of Sedgwick's status, and Van Aken's own credibility was so low. Had Sedgwick, on the other hand, testified that he was the true owner of the shares in his name, his evidence would have been the precise opposite of "cumulative," and Van Aken's story would obviously have been dealt a critical blow.

In fact, the Court was advised immediately after its instruction, with no disagreement by the Government, that Sedgwick would have "flatly contradicted" Van Aken if called (Tr. 1097). We respectfully submit that the Court committed reversible error when it then refused to correct a charge which was so obviously inapplicable to the facts, and which unfairly directed the jury to ignore a defense argument which was not only important and rational but also, in the unusual circumstances of this case, unquestionably correct.

C. The Trial Court Erred In Charging That The Jury Should Presume That a Person Intends The "Natural and Probable or Ordinary Consequences Of His Acts."

In connection with his instructions on knowledge

and intent, Judge Brieant told the jurors:

> "As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts." (Tr. 1059).

This instruction was error. United States v. Barash, 365 F.2d 395 (2d Cir. 1966); United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).

In Barash, this Court reversed a bribery conviction because the "natural and probable consequences" instruction was given. Judge Friendly, writing for the Court, noted that the instruction "serves no useful purpose" and wrongly shifts the burden of proof to the defendant. 365 F.2d at 402-03.

In Bertolotti, this Court reversed the defendants' convict on on other grounds. The Court, however, went on to criticize the giving of the "natural and probable consequences" instruction:

> "We have for many years warned against the use of this type of a charge, United States v. Barash, 365 F.2d 395, 402-03 (2d Cir. 1966), and are somewhat surprised at its continued appearance. Given our disposition of this case, there is no need to determine whether Judge Carter's erroneous charge constitutes reversible error. We wish, however, to take this opportunity to again stress our disapproval of the "natural and probable consequences" charge and to remind trial judges that its continued use may jeopardize otherwise sound convictions." (529 F.2d at 159).

The giving of this instruction under the facts of the instant case was highly prejudicial to DeBoer. There was no

evidence connecting DeBoer to the specific false registration statement filed on August 20, 1969. The prosecutor, however, argued in summation that DeBoer was responsible anyway for that filing (as well as all subsequent filings) because it was the natural consequence of his decision on April 22, 1969, to have Xprint stock issued in nominee name:

> "And ladies and gentlemen, on April 22, 1969, Mr. DeBoer planted the seed. He planted the seed by taking the stock and directing that it be issued in the name of James Lovelett. He planted the seed that led to the false statements relating to Mr. Lovelett in the registration statement, in the letters to the NASD, in the Lovelett letters to the S.E.C., and finally in the prospectus that got mailed out to the prospective purchasers of the stock. So when you listen to Mr. Naftalis' argument about Mr. DeBoer didn't file anything, and he was gone from the firm by the time it was sold to the public and all that kind of thing, just remember this: Mr. DeBoer planted the seed. Without the seed there is no flower. And the person who plants the seed is the person who is responsible for the flower." (Tr. 890).

The Court's erroneous instruction that DeBoer was presumed to intend the natural and probable consequences of his acts placed judicial approval on the prosecutor's argument. The jury was erroneously informed that they should presume that the falsity in the August 20, 1969 registration statement was the natural and probable consequence of DeBoer's decision four months earlier to place his stock in nominee name. However, for DeBoer to aid and abet the offense charged more than that was required; it was necessary that DeBoer consciously assisted in the commission of the specific offense in some specific way. The Court's erroneous instruction, however, allowed the jury to

find guilt merely on a presumption without more. This error was exacerbated by the fact that DeBoer did not testify at trial. The mischief of a "natural and probable consequences" charge in a case such as this is apparent. In any situation where a judge instructs the jury that it may "presume" what the defendant's state of mind was, the burden of going forward with some evidence to rebut that presumption insidiously shifts to the defendant. And when, as in the case at bar, the defendant chooses not to testify, that presumption of guilty intent goes unchallenged. Human nature being what it is, the only logical result of the trial court's charge with respect to intent was to magnify the defendant's failure to testify. We submit that that factor, superimposed upon the erroneous charge, mandates reversal.

CONCLUSION

For the reasons stated above, we respectfully submit that the conviction of appellant Franklin S. DeBoer should be reversed.

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Respectfully submitted,

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